tion or non-recommendation is not reviewable by the appellate courts,[16] that some courts refuse to allow evidence directed specifically toward a recommendation of mercy,[17] and the statement that the recommendation of mercy is not an issue of the case,[18] coupled with the refusal of the courts to charge on such evidence,[19] would tend to indicate that this recommendation is not based on the evidence presented in the case, but rather on the jury's impression of the man himself.[20]

It has been said that "a career of crime, sociologically conceived, is the culmination of a complex series of inevitable forces at work in the physical and social environment of the individual."[21] This statement represents the almost universal present-day thought on this question. Hence, it would seem best that the courts allow the jury to follow the rule laid down by Saleilles. "When it comes to determining the penalty, it is the entire man in totality of his moral nature that must be considered and not the fragmentary and incidental part of himself that has found expression in the crime committed."[22]

E. P. T.

EQUITY

Equity — Mutuality in Specific Performance of Requirements Contracts

The plaintiff, a gasoline station owner and operator, bought and paid cash for stock in the defendant corporation, owner and operator of a bus line, under a contract whereby the defendant promised to buy, and plaintiff to sell, all the defendant's requirements of gasoline, oil and grease at reduced prices, so long as the plaintiff should hold the stock.[1] The plaintiff asked an injunction to prevent the defendant from purchasing his requirements elsewhere. The injunction was granted, the court holding that mutuality of obligation is not essential to the specific

[16] *Hoppe* v. *State*, 29 Ohio App. 467, 163 N.E. 715 (1928); *Aiken* v. *State*, 170 Ga. 895, 154 S.E. 368 (1930).

[17] *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935).

[18] *Ashbrook* v. *State*, 49 Ohio App. 298, 197 N.E. 214 (1935); *State* v. *Martin*, 92 N.J.L. 436, 106 Atl. 385, 17 A.L.R. 1090 (1919).

[19] *Supra*, note 16.

[20] *State* v. *Caldwell*, 13 Ohio Op. 98 (1938), overruled in 134 Ohio St. 424 (1939).

[21] Brill and Payne (1 ed. 1938), "The Adolescent Court and Crime Prevention," p. 13.

[22] Saleilles (1 ed. 1913), "Individualization of Punishment," p. 165.

[1] Note that this contract presents some features of an option, a unilateral contract, and a bilateral contract. If it is construed as a bilateral contract, plaintiff would be considered as promising in the alternative either to supply the defendant's requirements or to sell his stock. Since either performance would be sufficient consideration if it alone were bargained for, the promise is not illusory. 1 American Law Institute, Restatement of the Law of Contracts, §79.

enforcement of the contract as against the purchaser, where there is an independent consideration for the purchaser's obligation to buy, and that mutuality of remedy is not a requirement for specific performance,[2] overruling *Steinau* v. *The Gas Co.*[3]

The question of mutuality of remedy which the defendant raised has troubled courts of equity in this country for nearly a century. Briefly stated, it is, may one party to a contract be granted specific performance simply because the other party would have been entitled to it in a suit at his instance? And, conversely, must equity deny this relief to a suitor whose right is otherwise unquestionable, for the sole reason that his adversary for one reason or another would not have been given specific performance? This second, or negative, aspect of the question was presented in the case of *Hills* v. *Croll.*[4] In that case the nature of the plaintiff's obligation was such that a decree in equity could not have compelled its performance,[5] and the chancellor concluded that this fact must defeat the plaintiff's suit. In the instant case the defendant is in much the same position. A decree of specific performance, or its practical equivalent, an injunction against the breach of a negative covenant, would not issue against the plaintiff if the defendant desired it, not only because the court could not require him to continue to supply the defendant's requirements, but also because he had the power to terminate the contract, and so could render the decree nugatory. An application of the rule of *Hills* v. *Croll,*[6] followed in *Steinau* v. *The Gas Co.,*[7] would have required the dismissal of this suit, but the Supreme Court of Ohio has abrogated the rule. An increasing volume of authority supports this decision.[8] The principle of mutuality of remedy has been questioned by able writers, and shown to be so riddled with exceptions that little of substance remains of the rule.[9] There is little support for the affirmative proposition to be found in the English decisions, but the courts of several jurisdictions in this country, attracted by the plausibility of the rule, still follow the *Hills* case.[10] The Restatement of Contracts denies the existence of the negative aspect of the rule, but admits

[2] 135 Ohio St. 509, 21 N.E. (2d) 669 (1939).
[3] 48 Ohio St. 324, 27 N.E. 545 (1891).
[4] 2 Phillips 60 (1845).
[5] The plaintiff promised to manufacture and supply acids to the extent of the defendant's requirements.
[6] *Supra,* note 4.
[7] *Supra,* note 3.
[8] *Eckstein* v. *Downing,* 64 N.H. 248, 9 Atl. 626, 10 Am. St. Rep. 404 (1886); *Porter* v. *The Land and Water Co.,* 84 Me. 195, 24 Atl. 814 (1892).
[9] Ames, *Mutuality in Specific Performance,* 3 Col. L. Rev. 1; Clark, *Some Problems in Specific Performance,* 31 Harv. L. Rev. 271.
[10] *Supra,* note 4. Cf. *Thompson* v. *The Shell Petroleum Corp.,* 130 Fla. 652, 178 So. 413, 17 A.L.R. 248 (1938).

that the principle may still be influential in granting equitable relief where the measure of damages in an action at law would be hard to determine.[11]

In the case at hand, however, there is a question of mutuality which is more substantial. Since the plaintiff may by selling his stock put an end to his obligation, should the defendant be compelled to perform? If one party to a wholly executory contract has the power of termination, he can gain an advantage by its exercise over the helpless defendant, whose performance has been compelled. Accordingly, specific performance will never be decreed in favor of one having the power of termination unless the agreed exchange can be secured to the defendant. The unilateral contract presents no such difficulty; the defendant has received the benefits of full performance. Similarly, where an independant consideration is the basis of the defendant's obligation, as in the case of an option, there is no such question of mutuality. The Supreme Court of Ohio, in the principal case, considered the contract to be in the nature of an option. If this is the case—and certainly the contract does present some aspects of an option—there is no want of mutuality of obligation. But it is suggested that since the plaintiff's obligation to supply the deefndant's requirements is unperformed, and that obligation is terminable at the plaintiff's will, the question of mutuality persists.

Whether this right of termination by one party requires the court to refuse specific performance has been the subject of some conflict in the reported cases. The proposition that the relief should be denied on this basis alone is unsupported by the English decisions, although there is some authority in this country to that effect, notably *Rutland Marble Co.* v. *Ripley*.[12] More recent cases, however, adopt the sounder view that unless the plaintiff's right of termination makes security to the defendant impossible, it will not preclude granting the relief.[13]

[11] In the illustrations to 2 A.L.I. Restatement of Contracts, § 372, sub-section 2, the following example is given:

> "A makes a bilateral contract for the sale of Blackacre to B for $5,000. On breach by B, prior to conveyance, A can get a decree for the payment of the full price, conditional on proper conveyance. A's remedy in damages would be a judgment for $5,000 less the market vaue of the land, the conveyance of which B has prevented. Since this remedy is of doubtful adequacy, and since B could get a decree for specific performance, the court gives a like remedy to A."

[12] 10 Wall. (U. S.) 339, 19 L. Ed. 955 (1870); and cf. *Rust* v. *Conrad*, 47 Mich. 449, 11 N.W. 265, 41 Am. Rep. 720 (1882). The decision of this case was recalled by statute. Laws of Mich., 1883, act no. 73.

[13] *Zellchen* v. *Lynch*, 80 Kan. 746, 104 Pac. 563, 46 L.R.A. (N.S.) 659 (1909); *St. Joseph Hydraulic Co.* v. *Globe Tissue Paper Co.*, 156 Ind. 665, 59 N.E. 995 (1901); *Singer Sewing Machine Co.* v. *Union Buttonhole* Co., 22 Fed. Cases 220 (1873); *McCall* v. *Wright*, 198 N. Y. 143, 91 N.E. 516, 31 L.R.A. (N.S.) 249; *Philadelphia Ball Club* v. *Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L.R.A. 227, 90 Am. St. Rep. 627 (1902); *Grove* v. *Hedges*, 55 Pa. 504 (1867); *Thompson* v. *Shell Petrolcum Corp.* (1938), *supra*, note 10.

This "security" to the defendant need only consist of some form of assurance to the court that the plaintiff will perform his obligation. In *Zelleken* v. *Lynch*,[14] the court found that the plaintiff's expenditure of a considerable sum in developing the leases in question was satisfactory proof of his intention to perform. Sometimes the fact that the plaintiff has elected to bring suit is considered sufficient.[15] This consideration is of less magnitude, however, in the principal case, as the contemplated performance is concurrent. In this situation a conditional decree affords adequate protection to the defendant.[16] Under such a decree, the plaintiff's right is made contingent upon his continued performance, and the defendant is fully protected. J. R. E.

EVIDENCE

Evidence — Husband and Wife — General Incompetency to Testify against Each Other in Criminal Proceedings

Defendant was indicted and found guilty of cutting with intent to wound one Delia Wright. The trial court, over defendant's objection, permitted his wife to testify against him as a witness for the state. From the action of the trial court overruling a motion for a new trial, defendant prosecuted appeal. In reversing the conviction and remanding the cause, the Court of Appeals for Hamilton County, applying the pertinent statute,[1] found the language to "exclude the possibility of construing it as implying an intention to clothe the wife with a general competency as a witness against her husband."[2]

The Ohio statute provides in part: "No person shall be disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction of crime. Husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for personal injury of either by the other . . . "[3] It is well settled that the removal

[14] *Supra*, note 13.

[15] *Philadelphia Ball Club* v. *Lajoie*, *supra*, note 13.

[16] *Gt. Lakes & St. Louis Transportation Co.* v. *Scranton Coal Co.*, 152 C.C.A. 437, 239 Fed. 603 (1917); *Elk Refining Co.* v. *Falling Rock Cannel Coal Co.*, 92 W. Va. 479, 115 S.E. 431 (1922); *Fuchs* v. *Motor Stage Inc.*, 62 Ohio App. 20 (1939); 2 A.L.I. Restatement of Contracts, § 372, comment.

[1] Ohio G.C. sec. 13444-2.

[2] *State* v. *Goodin*, 60 Ohio App. 362, 14 Ohio Op. 244, 28 Ohio L. Abs. 421 (1939).

[3] Ohio G.C., *supra*, note 1.